Written evidence submitted by the Employment Lawyers Association (ERB10)

Public Bill Committee Call for Evidence
on the Employment Rights Bill

INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 7,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. We make no comment on policy. That is for the Members of Parliament. We address the Bill from the perspective of experts who know how the Act will be used.

3. This response is drafted by the Chair of the Association and the Chair of the Legislative and Policy Committee, Caspar Glyn KC and Catrina Smith respectively.

4. We have not sought to comment on all of the provisions of the Bill but have chosen those where we feel that more thought is needed.

EXECUTIVE SUMMARY

5. The Bill needs considerable further thought and amendment if the Committee
   5.1. want to pass an Act that will actually be used by workers to enforce their rights and will not swamp business, not just with cost, but recurring obligations that confuse even senior and experienced lawyers;
   5.2. want to avoid a series of unintended consequences creating a legal uncertainty and contradictory obligations.

6. We counsel that Parliament should consider
   6.1. revisions to the scope of the Fair Work Agency which would mean that the Act would not just sit on the statute book, inaccessible and unused by workers, but live and breathe in UK workplaces;
   6.2. revisions to other parts of the Bill so that workers get the rights that Parliament wishes to give them but avoiding damaging businesses; and
   6.3. further thought and revisions to address the, we assume, unintended consequences and contradictory positions.

Clause 1 – Zero Hours Contracts

7. We understand the policy aim to change the balance in zero hour work relationships. However, sections 27BA to 27BH will grant workers rights that are so difficult to navigate that this may well impact their ability to be enforced, place difficult recurring burdens on employers and give rise to unintended consequences. Secondary legislation does not, in our experience, simplify primary legislation.

8. First, the recurring need to make a “guaranteed hours offer” (“GHO”) at times “reflective” of the days and times worked by the worker in the previous 12 weeks is, in itself, a burdensome obligation. Even for the workers who want to maintain flexibility of a traditional zero hours work, a GHO has to be made. We understand

that an opt out to a GHO could be abused by an employer, but it does then place a recurring obligation that is for little good purpose.

9. Second, we have real concerns about seasonality. Hospitality is the biggest use of zero hours work (32% from the House of Commons Library Research September 2024). The hospitality worker doing all the hours that a business needs in, say, the 12-week period before Christmas and then the employer having to offer a basket of hours based on that period. The provisions attempt in ss.27BB (7)-(11), to provide an option for an employer to use a fixed-term contract (if that is reasonable). We apprehend that is directed to address the seasonality problem. Whether it is reasonable depends on whether there is only a need to perform a specific task (like perhaps the farm worker during harvest – (4% of ZH workers)). It seems to us that very different considerations would apply in the hospitality sector where fewer drinks might need to be served after Christmas, but they would still need to be served.

10. Third, the unintended consequences
    10.1. How will the termination of a fixed-term contract (defined as a dismissal under s.95 Employment Rights Act) then interact with day-1 unfair dismissal rights? Will we see the “Christmas”, or the “Summer Season” Fixed Term Contract (FTC) come into being? Will there need to a fair dismissal in each case?
    10.2. If an offer is given for a zero-hours FTC of fewer hours than before - will that be caught by fire and re-hire?
    10.3. There could be an incentive for employers to offer irregular work patterns, so that workers don’t “regularly” work over the low hours threshold and don’t qualify for a GHO. This would seem to contradict the policy intent.

11. Fourth, the provisions are, we understand, directed at protecting the exploited. Generally, the low paid. There are a raft of zero hour workers who are consultants

and paid very generously. We would counsel Parliament to put a cap on hourly pay above which these provisions should not apply. That would require public consultation.

12. Fifth, the Bill needs to ensure that it will not, as the Next Steps to Make Work Pay document sets out, apply to ad hoc or occasional staff so that this will need to be considered in the hours that count in a reference period.

13. We have concerns that the method of using a guaranteed basket of hours is now baked into the legislation. That idea has required more tortuous regulation layering complexity on complexity. The problem is that the rights are for the low paid and they relate to ongoing obligations to make offers which can be accepted throughout the course of employment. It is fanciful to think that a non-unionised low paid ZH worker will issue proceedings for breaches for small sums that will not reach Tribunals for many months or even years. If these regulations are to work, then the enforcement provisions should be opened out to the Fair Work Agency and not simply rely on low paid workers to enforce their rights. We address that below.

14. We also suggest that the Committee consider the possible impact of these provisions in the context of business transactions where the incoming employer may have different needs and be unsighted as to the details of the hours such workers have been working. At the very least, we suggest that information on the hours worked by ZH workers should be included in the employee liability information required by Regulation 11 of the Transfer of Undertakings (Protection of Employees) Regulations 2006, particularly if the protection of these Regulations is to be confirmed as extending to workers.

15. We ask the Committee to stop and to think about alternative approaches. Perhaps by providing a simple template offer and more clarity as to how variable demand is dealt with in a business to address the seasonality issue.

16. We fully accept the counter position, which is that some businesses currently externalise the employment cost risks of flexibility requiring more or fewer workers at any one period on to its ZH workers. That reallocation of economic risk that began with the prevalence of ZHCs since 2012 can seem unfair and places the risk on the worker who is generally less able to deal with the consequences of no pay or being inflexibly available. If that is right, then is it unfair to ask business carefully to assess their needs and plan for those needs by right sizing their labour needs and properly planning for them so that the risk is theirs and not that of the precarious low paid? But are there other ways to make this right that don't rely on this mechanism.

17. We recognise that there is an Agency consultation ongoing. There is an issue for Government as if agencies aren't regulated then some business will "outsource" the issue but if agencies are regulated then labour flexibility may be unduly compromised.

Clauses 2 - 4 Cancellation and Curtailment of Shifts

18. The word "specified" appears regularly and is yet to be specified. We have concerns as to whether workers would enforce these rights to small sums of money in a relatively complex procedure. We address that below.

19. The legislation needs to distinguish between a requirement to work a shift on short notice and an offer to work a shift on short notice. The latter can benefit both the worker and the employer.

Clause 6 - Exclusivity

20. We make no comment on this part of the Bill. We do note that one of the consequences of banning exclusivity may make it more difficult for zero hours workers to claim worker status. This is because when a Tribunal comes to consider whether a zero hours worker has the status of a worker then, when it comes to considering the third question relevant to employment status, one relevant factor maybe the absence of mutuality of obligations between engagements (**PGMOL v HMRC** [2024] UKSC 29 **Windle v Secretary of State for Justice** [2016] EWCA Civ 459). Whereas, the Courts have held that the presence of exclusivity in cases such, as **Bates van Winkelhof v Clyde & Co LLP** [2014] ICR 730, that one of the reasons the Claimant was a worker was because she could only work for her employer.

Clause 7 – Flexible Working

21. We compliment Officials and the Draftspersons. These provisions are well drafted and workable subject to one issue. What does Parliament want the word "reasonable" to do in section 7(3)(ii)? At present the effect of the provision is uncertain. We counsel Parliament to resolve the uncertainty.

22. "Reasonable" can be interpreted in a number of ways by Tribunals and Courts. It does set an objective standard, but courts will graft on this section their own interpretation. For example,

    22.1. The Courts could decide that "reasonable" should be interpreted as applying only to the employer's needs. It is the decision making and concerns that the employer has that need to be reasonable. The employer would not under this interpretation have to pay any attention to the effect on the employee.

    22.2. The Courts could decide that "reasonable" requires a consideration of both the impact on the business and the worker. That would require a

balanced assessment which is more akin to what we would call a justification defence which require a Tribunal to balance the word reasonable not just with the concerns of the employer.

23. Our views are that the Courts will more likely favour the first interpretation over the second. Does Parliament want to leave this to the Courts, or would it prefer to set it out? Does Parliament consider that it should phrase the test more as one of objective justification? That would place a heavier burden on employers. Objective justification would require a legitimate aim (one of those at s.7(1ZA)) and then consideration of the aim being proportionate, appropriate and necessary compared with the effect on the worker. This would set a higher bar. Alternatively does Parliament want to clarify reasonableness as being simply that of the employer or balanced by effect on the worker?

Clauses 15-18 Harassment

24. On 26 October 2024 the lighter touch duty to prevent Third Party sexual harassment came into force. Lawyers and clients worked at full stretch and continue to do so to meet that one duty to one protected characteristic.

25. The defence for the employer which will be changed from taking “reasonable” steps to “all reasonable steps” is such an onerous one that it risks imposing strict liability. Our experience is that the all “reasonable steps” defence under section 109(4) Equality Act 2010 is never run because it never succeeds. We understand the policy desire to stop this unwanted and reprehensible conduct of third parties, but if a defence is provided for employers, then it should be one which can, in practice, be used. If the bar is set too high, then employers will be less incentivised to take steps to prevent harassment.

26. The Bill Committee may think that there is a distinction in the control an employer can wield over a worker as opposed to a third party and so the defences should recognise that distinction?

Clause 19 Day 1 Unfair Dismissal

27. First, the unintended consequence created by Day 1 rights and section 95(1)(b) Employment Rights Act. The ending of any limited term contract such as, the expiry of a one-off contract for a shift for an employer which ends and is not renewed, is a dismissal. On the face of it, the ending of that contract would trigger the day-1 right not to be unfairly dismissed. Section 98ZZA(5) may address that consequence so that two or more periods of employment can be aggregated into continuous employment. If that is right, then is the dismissal by the ending of the first contract erased by a following period of employment? If so, does the dismissal in fact take place when a further period of employment is not offered? It may be that a period of time can be specified as to when such a dismissal takes place – e.g. if no further contract is offered in three months, the dismissal is deemed to have occurred on the three-month anniversary. This is a lacuna to be addressed. Record keeping will need to be increased.

28. Second, does the Initial Period of Employment ("IPE") keep on renewing on each re-engagement? The solution could be dealt with by regulations simply specifying that the provision relating to two of more periods of continuous employment being treated as a single period of continuous employment is for only for the purposes of calculating the IPE only. As such, assuming a 9 month IPE, if say an employee worked under a 6 month contract and then after a break of say two weeks began work under a Second 6 month contract, the "dismissal" upon the expiry of the first contract would stand (if the employee brought an unfair dismissal claim for that termination then the IPE dismissal criteria apply), but as for the second contract the 9 month IPE period would be shorted to 3 months to

take account of the first 6 month contract. Accordingly on the expiration of the second 6-month contract, full unfair dismissal rights would apply in relation to that termination as it would have taken place outside of the IPE. Again, this leads to record keeping burdens.

29. Third, the words "of a kind such as to justify the dismissal" are missing in the proposed s98ZZA(3)(b). That would seem to lead to the interpretation that as long as the reason relates to the employee, the reason itself does not need to be one capable of justifying dismissal although the employer is subject to section 98(4) ERA 1996

30. Fourth, will a 9-month IPE encourage employers to insert longer 9-month contractual probationary periods for ease of administration/record keeping? It is important to avoid confusion between contractual probationary periods and the IPE. We note that under section 1(4)(ga) ERA 1996, the Written Particulars of Employment must state "any probationary period, including any conditions and its duration" and presumably this will continue to only relate to contractual probationary periods.

31. Fifth, we note that the concept of an IPE where the “normal” rules on unfair dismissal are likely to be relaxed will not apply to dismissals under s98(2)(c) i.e. redundancy. This is likely to lead to rather odd outcomes, particularly again, with regard to seasonal work. In order to be fair, an employer must (broadly) have a fair reason for dismissal and follow a fair procedure. In the context of a redundancy, that can involve consultation with the employee, seeking suitable alternative employment, ranking employees based on performance etc. For seasonal employees, an employer may have to start consulting with them about redundancy on day one of their employment. Such an arrangement could see permanent employees being brought into a redundancy selection process

contrary to standard industrial relations practice in which employers are encouraged to look first to reducing their cadre of temporary workers before making redundancies amongst permanent employees. We would suggest that the relaxation of the general rules during the IPE applies to all dismissals and that the interaction between these provisions and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 is considered.

32. There is also a promise to signpost where such probationary claims may or may not succeed and, in some way, in a further consultation, to alter the compensation regime that may apply to probationary dismissals. We are ready to give the views of all sides of industry to ensure that the law is workable.

Clause 22 Fire and Re-Hire, Hire

33. First, the use of the word “likely” in 104I(4)(a) has variously been interpreted in the employment world as meaning from the one end of, “could well happen” (definition of disability) to “pretty good chance” or a “significantly higher degree of likelihood than more likely than not” (interim relief). If the former, the test is more easily met and if the latter, the employer better have cash flow predictions showing that it is about to go under if it makes no changes. Does Parliament want a particular outcome?

34. Second, the consequence of this policy choice means that businesses that previously survived may now not be able to act until it is too late and then go under. In addition, the words "at the time of the dismissal, were affecting the employer’s ability to carry on the business as a going concern", have potentially concerning implications for claims against directors for trading whilst insolvent let alone the PR issues for contractors, suppliers and others when a company saying it is in financial distress.

35. Third, if an employer needs to change the hours of its workforce or make other changes to meet new contractual specifications and the employees do not agree, then dismissals to meet that business need will be unfair – cue loss of the contract. Additionally, if an employer needs to address changes to employment caused by Government regulations but cannot do so then what is the effect? Darren Newman in his Range of Reasonable Responses Blog suggests the insertion of “technical or organisational reasons” to the exception.

36. Fourth, in the case of an employer wanting to change some terms such as hours, that are agreed by the vast majority of the workforce (possibly even beneficial to the majority of the workforce) but a couple of employees object. If the changes are imposed those employees who objected will have a potential claim for automatic constructive unfair dismissal. Does Parliament considered that there is a missing “reasonableness” element to the test to address this issue?

37. Fifth, Tribunals have not hitherto become involved in how businesses are run. It will now be a fact in issue whether the employer is in financial difficulties need to be mitigated by changes rather than other changes. It is not a role that judges should necessarily play.

38. Sixth, will compensation for this dismissal be capped? The Bill does not currently amend the list of claims under section 124(1A) ERA 1996 to which the usual cap on the compensatory award does not apply.

39. Seventh, as noted above these provisions could dissuade or prevent an employer from offering employees who have been working on a seasonal basis a new contract with fewer hours which better reflect the actual business need and instead offer no work at all.

Clause 23 Collective redundancy: extended application of requirements

40. Members of the Committee will, of course, understand that the definition of "collective redundancy" is of far greater scope than how the layperson understands the word "redundancy". However, s.195 TULR(C)A defines "a dismissal as redundant" as one which is "for a reason not related to the individual concerned". The Supreme Court confirmed that the only dismissals exempted from this definition were dismissals which were because of something to do with the individual employee or something that they have done. It did not apply to the employers' reasons such as, where there was no redundancy, a reorganisation or other business reasons for the changes that did not amount to redundancy (**UCU v University of Stirling** [UKSC] 26.

41. Accordingly, the removal of provisions tying the collective consultations to the concept of an "establishment" will have a number of (possibly unintended) consequences.

42. First, employers are required to notify the Secretary of State of any collective redundancies. The rationale for this has been so that Government and local MPs can be alerted to potentially significant economic events in a particular locality/constituency. Removing the link to an "establishment" will likely mean that this local intelligence will be lost or more obscured – particularly if the resources to deal with the increase in notifications are not made available.

43. Second, large employers with multiple sites and seasonal variations in demand (e.g. retailers, the hospitality industry) making small unrelated changes in different sites may find itself over the 20-person dismissal consultation threshold every 90 days. They may find themselves in a process of almost constant consultation with employee representatives, to say nothing of the administrative burden of collating employee turnover from large numbers of sites.

44. Third, particular anticipated fluctuations in demand, such as the Christmas period, could (unless they use fixed term contracts) see employers having to begin collective redundancy consultation as employees are hired or, in some cases, even before they have started work.

45. For example, there could be a warehouse in Scotland that is being re-organised requiring 10 redundancies, 45 days later there is a reduction in administrative staff at the head office in England requiring 8 redundancies, and then 30 days later a small retail outlet in Wales closes with 5 redundancies. Under the proposals, collective consultation is triggered for the 23 redundancies involved. In future large employers will need to ensure such unrelated redundancies or other reorganisations across different part of the business are highly coordinated. Is that the policy intention? If it is simply to address the Woolworth's loophole, then there are unintended consequences which could be addressed by amending the provision so that it only removes “at one establishment” where there is a redundancy exercise driven by a common underlying business reason. However, that would not address the seasonality issue.

46. Fourth, before 1 January 2024 the UK was bound by the European Court of Justice’s decision that the 90-day period had to be counted both backwards and forwards on each proposal. So that when proposing to dismiss for business reasons every business had to look back 90 days to see if the proposals triggered the obligation to consult, and then forwards. This gives rise to the issue where, if dismissals have happened and not been consulted upon, whether there is a breach.

47. Fifth, the impact on employers may be greater still as the consultation, launched on 21 October 2024, seeks views on increasing the protective award from 90 to

180 days or even removing the cap altogether. Then there is the proposal of an interim award whereby the employee would be paid until the case is heard, normally at least a year later at an Employment Tribunal. This would lead to issues surrounding audit and disclosures of these liabilities. We understand that the policy intent is to prevent businesses misusing the system for their own gain. Perhaps this is where the focus should be?

48. Sixth, collective redundancies often occur in the context of an insolvency. Increasing the penalty for failure to inform and consult will exacerbate the difficulties insolvency practitioners find themselves in. For example, under the Insolvency Act 1986 administrators have to act in the best interests of creditors as a whole. Keeping employees in employment beyond the fourteen-day window afforded to administrators to decide whether to adopt the contract and in order to carry out an information and consultation process, makes those employees "super priority" creditors. That reduces funds available for other ordinary creditors. In some cases, the employment costs could make administrators reluctant to take on the role. This may have the result leading to fewer contracts being adopted and further liabilities falling on the National Insurance Fund.

Part 5 Fair Work Agency

49. If Parliament wants the laws that it passes to be effective, then the rights must be (i) accessible in the sense of being capable of being understood and (ii) provide access to justice.

50. A properly resourced and empowered FWA could solve both problems and provide effective access to Parliament’s Act. Even with amendments this Act will be complex. Resolution Foundation research has revealed that 1m workers are not paid holiday pay, 25% of workers paid within 5p of the minimum wage do not receive it. On the other hand, HMRC enforcement of the NMW results in about

200,000 workers being afforded the minimum wage. Many of these workers speak English as a second language and find grappling with employment law difficult and tribunals difficult. Many workers fear reprisals if they make claims. It is no good saying that these workers living hand to mouth can bring a claim for reprisals. They can, but no claim will be heard for a year or in parts of the country, two years.

51. Second, Parliament must recognise that the new rights it passes, including the Day 1 rights will lead to further claims. As of June 2024, there were 668,000 Employment Tribunal claims outstanding. In the previous year, the caseload grew by 4%. The Tribunal cannot deal with the work that it has. It will be less able to deal with the work that is produced by this Act without considerable increase in its judicial capacity.

52. Lawyers are expensive both for workers and for businesses. The transactional cost of enforcing rights is often not worth the expense of doing so. A net £70 for a cancelled shift? Who is going to bother enforcing that?

53. It is for Parliament to grapple with the real-world issue of enforceability. We would counsel similar powers being granted to the FWA that it will have under the National Minimum Wage Act 1998, to a much wider number of claims. Enforcement notices and offences are important but what matters to workers is that they receive the compensation so that they can make their work pay.

54. Under the NMWA 1998 Notices of Underpayment are issued by HMRC to recoup compensation and provide for a financial penalty too. Those Notices can be appealed to the Tribunal. They rarely are. We would counsel consideration, following an appropriate period of public consultation, of extending these

mechanisms to such as Holiday Pay and Zero hours contracts (if the provisions are simplified so that businesses can properly comply with them).

55. Effective enforcement will save Government money by reducing the resources demanded by the Employment Tribunal system. It will generate money by increased PAYE receipts. It will prevent cowboy employers undermining our clients who are proud to discharge their responsibilities to their workforce. Enforcement must be sensitive to employers struggling to handle new law and complex provisions so that financial penalties are not onerous in cases where the employer can satisfy enforcement officials that the breach was inadvertent and was not undertaken for gain.

56. Effective enforcement, sensitive to the difficulties, sometimes, of compliance, will make work pay.

CASPAR GLYN KC **CATRINA SMITH**

17 November 2024